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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-91; FAR Case 2014-012; Item X; Docket No. 2014-0012;
Sequence No. 1]

RIN 9000-AM75

**Federal Acquisition Regulation: Limitation on Allowable
Government Contractor Employee Compensation Costs**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA and NASA are adopting as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Bipartisan Budget Act of 2013. The final rule revises the allowable cost limit relative to the compensation of contractor and subcontractor employees. Also, this final rule implements the narrowly targeted exception to this allowable cost limit for scientists, engineers, or other specialists upon an agency determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

DATES: Effective: [Insert date of publication in the
FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Ms. Kathlyn J. Hopkins, Procurement Analyst, at 202-969-7226, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-91, FAR Case 2014-012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 79 FR 35865 on June 24, 2014, to implement section 702 of The Bipartisan Budget Act of 2013 (Pub. L. 113-67), which amended the allowable cost limits of contractor and subcontractor employee compensation. Specifically, section 702 revised the application of the compensation cap, the amount of the cap, and the associated formula for annually adjusting it. The existing formula for determining the limit on the allowability of contractor and subcontractor employee compensation costs under 41 U.S.C. 1127 was repealed for contracts awarded on or after June 24, 2014. Section 702 of the law set the initial limitation on allowable contractor and subcontractor employee compensation costs at \$487,000 per year, which will be adjusted annually to reflect the change in the Employment Cost Index for all workers as calculated by the Bureau of Labor Statistics. This final rule also implements the authority provided by 10

U.S.C. 2324(e) (1) (P) and 41 U.S.C. 4304(a) (16), as amended by section 702(a), in which Congress has authorized the heads of Executive agencies to establish "one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities."

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of significant changes.

This final rule adopts the interim rule with four changes for clarification.

- The first clarification entails the addition of a table to FAR 31.205-6(p) that summarizes the applicability dates contained in this FAR section.
- The second clarification concerns the reorganization of the FAR text. Existing FAR paragraph 31.205-6(p) (4) has become new paragraph (p) (1), with existing paragraph (p) (1) becoming new paragraph (p) (2). Existing FAR paragraphs 31.205-6(p) (2) and (p) (3) have become new paragraphs (p) (3) and (p) (4), respectively.

- The third clarification entails the removal of the following redundant FAR 31.205-6 text:
 - o Paragraph (p) (2) (ii) text "Costs incurred after January 1, 1998."
 - o Paragraph (p) (3) (ii) text "Costs incurred after January 1, 2012."
 - o Paragraph (p) (4) (ii) text "Costs incurred on or after June 24, 2014."
- The fourth clarification entails reference links in paragraphs (p) (2) and (p) (3) (see https://www.whitehouse.gov/omb/procurement_index_e_xec_comp/) and another reference link in paragraph (p) (4) (see <http://www.whitehouse.gov/omb/procurement/cecp>). Additionally, some statutory references and explanatory text were added in FAR paragraphs 31.205-6(p) (3) and (p) (4).

B. Analysis of public comments:

The Regulatory Secretariat Division received responses from three respondents to the interim rule, which are discussed below:

1. Support for the Rule.

Comment: One respondent strongly supported the interim rule and applauded the FAR issuing agencies for meeting the statutory deadline for issuance of this rule.

Response: The Government notes the public support for this rule.

2. Application of Rule to Nonprofit Organizations.

Comment: One respondent stated that the rule only referenced FAR 31.205-6. Respondent questioned whether this means that the new compensation cap will only apply to contractors or subcontractors that follow this FAR section; would a nonprofit organization that complies with FAR subpart 31.7 be exempt from the compensation cap; or will FAR subpart 31.7 be amended as well.

Response: A nonprofit organization that complies with FAR subpart 31.7 is not exempt from the compensation cap in this rule. Previously, FAR 31.702 referenced the Office of Management and Budget (OMB) Circular Number A-122, Cost Principles for Non-Profit Organizations. The recent FAR case 2014-023 updated the reference from OMB Circular A-122 to the revised OMB Uniform Guidance at 2 CFR 200, subpart E, and applicable appendices, as in effect on the date of the contract, which references the statutory compensation ceilings. These cost principles reference the compensation cap contained in this FAR rule.

3. Retroactive Application of Rule Not Appropriate.

Comment: The interim rule stated that the revised compensation cap "will apply to the costs of compensation for all contractor and subcontractor employees for contracts

awarded, and cost incurred, on or after June 24, 2014.” One respondent stated that reading this sentence literally, the interim rule provides that all executive compensation costs are subject to the revised cap no matter when the contracts to which such costs are allocated were awarded which makes application of the rule retroactive which is inappropriate.

Response: The rule applies to costs incurred on contracts awarded on or after June 24, 2014, and does not apply retroactively to contracts awarded before June 24, 2014. For further clarification, Table 31.1 has been added as a summary of the applicability of the three compensation caps.

4. Application of Rule to Fixed-Price Contracts.

Comment: One respondent requested that specific preamble language be included in the final rule that reinforces the existing FAR part 31 language which specifies the application of the cost principles to fixed-price contracts whenever cost analysis is performed. Respondent also stated that by allowing fixed-price contracts that are subject to cost analysis to evade this compensation cap defeats Congressional intent and costs taxpayers significantly.

Response: The reinforcement of this existing FAR part 31 language is unnecessary. This FAR rule revises FAR 31.205-6 specifically regarding the allowability of

executive compensation. Other FAR cost principle sections such as 31.102 remain unchanged in their application and use, including when the cost principles are applicable to fixed-price contracts.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. because, an analysis of data in the Federal Procurement Data System (FPDS) revealed that

most contracts awarded to small entities are awarded on a fixed-price basis, and do not require application of the cost principle contained in this rule.

The rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Act (44 U.S.C. chapter 35).

List of Subject in 48 CFR Part 31

Government procurement.

Dated: September 19, 2016.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

INTERIM RULE ADOPTED AS FINAL WITH CHANGES

Accordingly, the interim rule amending 48 CFR part 31 which was published in the Federal Register at 79 FR 35865 on June 24, 2014, is adopted as a final rule with the following changes:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR part 31 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 31.205-6 by revising paragraph (p) to read as follows:

31.205-6 Compensation for personal services.

* * * * *

(p) Limitation on allowability of compensation.

Table 31-1 Employee Compensation Limits

Contract Award Date	Applicable Agencies	Covered Employees	31.205-6
Before June 24, 2014	Executive Agencies Other than DoD, NASA and Coast Guard	Senior Executive	(p) (2)
Before December 31, 2011	DoD, NASA and Coast Guard	Senior Executive	(p) (2)
On/after December 31, 2011, and before June 24, 2014	DoD, NASA, and Coast Guard	All Employees	(p) (3)
On/after June 24, 2014	All Executive Agencies	All Employees	(p) (4)

(1) Definitions. As used in this paragraph (p)–

(i) Compensation means the total amount of wages, salary, bonuses, deferred compensation (see paragraph (k) of this subsection), and employer contributions to defined contribution pension plans (see paragraphs (j)(4) and (q) of this subsection), for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in the contractor's cost accounting records for the fiscal year.

(ii) Senior executive means—

(A) Prior to January 2, 1999—

(1) The Chief Executive Officer (CEO) or any individual acting in a similar capacity at the contractor's headquarters;

(2) The four most highly compensated employees in management positions at the contractor's headquarters, other than the CEO; and

(3) If the contractor has intermediate home offices or segments that report directly to the contractor's headquarters, the five most highly compensated employees in management positions at each such intermediate home office or segment.

(B) Effective January 2, 1999, the five most highly compensated employees in management positions at each home office and each segment of the contractor, whether or not the home office or segment reports directly to the contractor's headquarters.

(iii) Fiscal year means the fiscal year established by the contractor for accounting purposes.

(iv) Contractor's headquarters means the highest organizational level from which executive compensation costs are allocated to Government contracts.

(2) Senior executive compensation limit for contracts awarded before June 24, 2014—(i) Applicability.

This paragraph (p)(2) applies to the following:

(A) To all executive agencies, other than DoD, NASA and the Coast Guard, for contracts awarded before June 24, 2014;

(B) To DoD, NASA, and the Coast Guard for contracts awarded before December 31, 2011;

(ii) Costs incurred after January 1, 1998, for the compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP), under 41 U.S.C. 1127 as in effect prior to June 24, 2014, are unallowable (10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as in effect prior to June 24, 2014). This limitation is the sole statutory limitation on allowable senior executive compensation costs incurred after January 1, 1998, under contracts awarded before June 24, 2014, and applies whether or not the affected contracts were previously subject to a statutory

limitation on such costs. (Note that pursuant to section 804 of Pub. L. 105-261, the definition of "senior executive" in paragraph (p)(1) of this section has been changed for compensation costs incurred after January 1, 1999.) See https://www.whitehouse.gov/omb/procurement_index_exec_comp/.

(3) All employee compensation limit for contracts awarded before June 24, 2014.

(i) Applicability. This paragraph (p)(3) applies to DOD, NASA, and the Coast Guard for contracts awarded on or after December 31, 2011, and before June 24, 2014.

(ii) Costs incurred after January 1, 2012, for the compensation of any contractor employee in excess of the benchmark compensation amount, determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) under 41 U.S.C 1127 as in effect prior to June 24, 2014 are unallowable (10 U.S.C. 2324(e)(1)(P) as in effect prior to June 24, 2014.) This limitation is the sole statutory limitation on allowable employee compensation costs incurred after January 1, 2012, under contracts awarded on or after December 31, 2011 and before June 24, 2014. (Note that pursuant to section 803 of Pub. L. 112-81, 10 U.S.C. 2324, Allowable costs under defense contracts, was amended by striking "senior executives" and inserting "any contractor employee", making unallowable the excess compensation costs incurred after

January 1, 2012, under affected contracts.) See https://www.whitehouse.gov/omb/procurement_index_exec_comp/.

(4) All employee compensation limit for contracts awarded on or after June 24, 2014.

(i) Applicability. This paragraph (p)(4) applies to all executive agency contracts awarded on or after June 24, 2014, and any subcontracts thereunder.

(ii) Costs incurred on or after June 24, 2014, for the compensation of all employees in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) are unallowable under 10 U.S.C. 2324(e)(1)(P) and 41 U.S.C 4304(a)(16), as in effect on or after June 24, 2014, pursuant to section 702 of Pub. L. 113-67. This limitation is the sole statutory limitation on allowable employee compensation costs incurred on or after June 24, 2014, under contracts awarded on or after June 24, 2014. See <http://www.whitehouse.gov/omb/procurement/cecp>.

(iii) Exceptions. An agency head may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities. In making such a determination, the agency

shall consider, at a minimum, for each contractor employee in a narrowly targeted excepted position—

(A) The amount of taxpayer funded compensation to be received by each employee; and

(B) The duties and services performed by each employee.

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